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IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, AND L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE LEGAL FOUNDATION OF WASHINGTON; AND GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, AND CHARLES Z. SMITH, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF TEXAS AND THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The Chief Justice and Justices of the Supreme Court of Texas, and the Texas Equal Access to Justice Foundation ("TEAJF"), respectfully submit this brief as *amici curiae* supporting the Respondents in this case.[1]

INTEREST OF AMICI CURIAE

The *amici* are defendants in litigation brought by Petitioner Washington Legal Foundation ("WLF") and two other plaintiffs challenging the constitutionality of the Texas IOLTA program. The *amici* previously were before this Court as petitioners in that case. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). In *Phillips*, this Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," but remanded for consideration of "whether these funds have been 'taken' by the State" and "the amount of 'just compensation,' if any, due respondents." 524 U.S. at 172.

On remand from this Court, the district court presided over a trial on the merits, made extensive findings of fact, answered both questions left open by this Court in favor of the *amici*, and upheld the constitutionality of the Texas IOLTA program. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 86 F. Supp. 2d 624 (W.D. Tex. 2000).[2] The district court found that the Washington Legal Foundation and its co-plaintiffs, including William Summers (the sole client in the Texas case), "failed

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici* have obtained from all parties their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amici* state that no counsel for the petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici* or its counsel, make a monetary contribution to the preparation or submission of this brief.

[2] In this brief, we refer to the proceedings on remand from this Court's 1998 decision in *Phillips* as "the Texas case."

to present any evidence that Mr. Summers' money . . . did and could" generate net interest, or a net benefit, if not for IOLTA. 86 F. Supp. 2d at 642-43. "[B]ased upon all the evidence before it," including Mr. Summers's own admission that "he was no worse off because of IOLTA," *id.* at 638, the district court found as a fact that "Mr. Summers's loss is zero." *Id.* at 643.

A divided panel of the Fifth Circuit reversed. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180 (5th Cir. 2001). The panel did not overturn any of the district court's findings of fact, but held instead that plaintiffs' failure to show any loss was "not relevant" and a "non-factor in the takings analysis." *Id.* at 188 n.6. The Fifth Circuit denied rehearing en banc by an evenly divided vote of 7-7. 293 F.3d 242 (5th Cir. 2002). *Amici*'s petition for certiorari currently is pending before this Court. (No. 02-01).

This case concerns the constitutionality of an IOLTA program of a sister State and presents issues very similar to those involved in *amici*'s own case. Indeed, WLF is a named plaintiff that has actively participated in both cases. The *amici* thus have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioners' argument that property has been taken from them for which they are entitled to be compensated is refuted by the trial record in the Texas case. After hearing testimony from banking experts, lawyers, and the plaintiff client, the district court found as a matter of fact that clients such as Mr. Summers incur no loss as a result of IOLTA programs. The record in the Texas case establishes that there is no economic loss, nor is there loss of any non-economic property right such as the right to control the use of one's property.

Deprived of a factual foundation, Petitioners' legal arguments depart from virtually every accepted principle of Just Compensation law. Petitioners argue for an extension of "per se" takings analysis – a position this Court rejected just last Term. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23, 1489 (2002). They argue that just compensation should be measured by the value of the IOLTA program to the government rather than from by the loss to the property owner – also contrary to established principles. *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). They argue that the absence of any compensable loss entitles them to an injunction and, implicitly, that they are entitled to seek redress in the federal courts rather than through any available state processes – again, arguments that have been rejected by this Court. *See City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

While this Court has long recognized that not every loss of property constitutes a Fifth Amendment "taking," *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), Petitioners' ultimate argument is that there can be an unconstitutional taking without the loss of any property right. That proposition not only lacks support in this Court's precedents, but contravenes the very purpose of the Just Compensation Clause. As this Court has recognized, the Clause is not a substantive limitation on government action. Rather, it provides those who have suffered a loss on account of government action a means of securing compensation. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

In the absence of any loss that merits compensation, Petitioners cannot establish a violation of the Fifth Amendment's Just Compensation provisions and are not entitled to an injunction.

ARGUMENT

In upholding the Washington IOLTA program, the Ninth Circuit en banc court correctly concluded that (i) there was no adverse economic impact on property owners; (ii) there was no interference with investment-backed expectations; and (iii) given the highly regulated nature of the banking and legal professions, the IOLTA regulations did not exceed what is "just and fair." *Washington Legal Foundation v. Legal Foundation of Washington,* 271 F.3d 835, 857-61 (9th Cir. 2001) (en banc). The court also held that even if the IOLTA program constituted a taking of clients' property, there would be no Fifth Amendment violation because "the value of their just compensation is nil." *Id.* at 864.

Each of those conclusions – all of which were based on the summary judgment record developed prior to this Court's decision in *Phillips* – is supported and confirmed by the trial record in the Texas case. In deciding "ultimate questions" of law, this Court has at times looked for "a more solid basis of findings based on litigation" than can be provided in a summary judgment record. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948); *see also Dombrowski v. Eastland*, 387 U.S. 82, 94 (1967); *United States v. International Union United Auto.*, 352 U.S. 567, 591-92 (1957). On a number of occasions, the Court has turned to the record in other cases to assist it in resolving the questions presented in the case on certiorari. *See Leary v. United States*, 395 U.S. 6, 48-53 & n.97 (1969) (assessing constitutionality of statute by looking to findings from a trial record in another case); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U.S. 331, 336 (1930) (taking

notice of the record in another case); *Hisock v. Varick Bank of New York*, 206 U.S. 28, 39 (1907) (same).

Consideration of the record in the Texas case is particularly appropriate here, since Petitioner WLF is a named plaintiff and active litigant in both cases, and had a full and fair opportunity to participate at trial. In deciding the questions left open by this Court on remand in *Phillips,* the district court heard testimony from the plaintiff client (Mr. Summers), the plaintiff lawyer, lawyers from Texas and elsewhere who explained the workings of their client trust accounts, an expert on banking and trust and estate law, the general counsel of the Independent Bankers' Association of Texas, and TEAJF officials.

Based on the testimony and other evidence, the district court held that there could be no Fifth Amendment violation because Mr. Summers had not suffered a compensable loss under any of the accounting theories presented by the plaintiffs. 86 F. Supp. 2d at 638-43. In addition, the court found that "[e]mploying an ad hoc analysis, and applying the fundamental principles of justice and fairness the Court finds that a taking has not occurred. The IOLTA program is not in any way unfair to Plaintiffs." *Id.* at 647.[3]

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[3] The court also held that the Texas IOLTA program did not unconstitutionally burden the plaintiffs' First Amendment rights. Noting Mr. Summers' testimony that he did not believe that he personally was identified with any of the causes funded by TEAJF with IOLTA funds, the court held that the program did not violate his right not to speak. *Id.* at 633-34. The court also held that IOLTA did not force property owners to financially support political ideological activity to which they objected. The court assumed for the sake of argument that there was a "compelled involuntary contribution," but held that helping ensure equal access to the justice system was not itself a political or ideological activity, and was germane to an important government interest in making legal services accessible to all. *Id.* at 634-37. On appeal, the Fifth Circuit did not

In the Washington case now before the Court, Petitioners rely on many of the same factual assertions rejected by the Texas district court and left undisturbed by the Fifth Circuit, namely that they have suffered a "loss" and are being unfairly singled out to bear a "burden." As set forth below, those claims – critical to Petitioners' constitutional arguments – could not be substantiated in the Texas trial.

I. CLIENTS INCUR NO LOSS AS A RESULT OF IOLTA PROGRAMS

A. There Is No Economic Loss

Petitioners assert in passing that they are economically worse off as a result of the Washington IOLTA program. *See* Pet. Br. 31 & n.11; 36 n.14. When Petitioner WLF was before this Court in *Phillips*, it made similar claims, and at much greater length. Part II of WLF's brief on the merits in *Phillips* argued that "virtually all clients would benefit financially if their funds were kept out of the IOLTA program." Brief of Resp. in No. 96-1578, at 36-45. Quoting an affidavit submitted by New York lawyer Robert J. Randell, WLF asserted: "It is common knowledge that today, interest net of any fees can be earned on virtually all client funds." *Id.* WLF's brief to this Court described a procedure known as "sub-accounting," by which "a lawyer opens in each client's name and tax identification number an interest-bearing account under the umbrella of, and linked electronically with, the lawyer's main trust account." *Id.*

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reach the First Amendment question. 270 F.3d at 185-86. The dissenting judge noted, however, that the First Amendment claim "will fall of its own weight." *Id.* at 203 n.43 (Wiener, J., dissenting). In the case under review, the Ninth Circuit also did not reach the First Amendment question. 271 F.3d at 871.

"The interest accrues to each sub-account separately, thereby eliminating any requirement that the attorney himself allocate total interest." *Id.* The bank also handles "IRS reporting tasks associated with each client's sub-account." *Id.* WLF suggested that such sub-accounting services are available from Texas banks "free of charge." *Id.*

On remand from this Court, WLF and its co-plaintiffs utterly failed to substantiate the assertions in Mr. Randell's affidavit. Mr. Randell testified concerning sub-accounting, as well as two additional methods by which funds deposited in IOLTA accounts allegedly could be made to earn a net benefit for the client: "in-firm pooling" and a "net benefit" theory. However, the district court found that the client funds at issue could not have earned interest for the client under *any* of these methods. 86 F. Supp. 2d 638-43. This finding was consistent with testimony by the client himself, Mr. Summers, who candidly admitted that he was "no worse off" as a result of the IOLTA program. *Id.*; Tr. 136.

"In-firm pooling," according to Mr. Randell, requires a lawyer to place client funds in a single money market account. The bank notifies the lawyer of the interest earned on the account, and then it is the lawyer's responsibility to "apportion[ ] the interest to each client." 86 F. Supp. 2d at 639. Mr. Randell testified that he employs in-firm pooling in his own law practice and charges clients an "administrative fee" equal to "about one-half of the interest earned" for his services. *Id.* Mr. Randell acknowledged, however, that he "rarely has the funds of more than six clients in his account," and sometimes "does not place client funds in an interest-bearing account because it is too little money or for too short a period of time to gain a net benefit for the client." *Id.*

The district court found that Mr. Randell's situation is "unique," because it involves "a small number of transactions, larger amounts of money, and . . . lengthy time periods." *Id.* The court found that these funds "in most cases

would earn a net benefit for the client without in-firm pooling." *Id.* Moreover, the "administrative fee" charged by Mr. Randell is assessed in such a way that "the larger dollar amounts in his 'pool' in effect pay the costs for smaller amounts and allow those smaller amounts to earn interest." *Id.* Mr. Randell "is subsuming the bank's role in an effort to generate an added administrative fee for his practice, albeit with the agreement of his clients," and must also "prepare the 1099 forms for each client earning in excess of $10 in interest." *Id.* In addition, "Mr. Randell's system is not a demand account as mandated by the rules of ethics." *Id.* Accordingly, the court found that "Plaintiffs have failed to establish that Mr. Summers' monies could earn net interest if placed in an in-firm pooled account." *Id.*

As for sub-accounting, the district court reviewed the testimony of witnesses familiar with Texas bank products, and found that "at this point in time sub-accounting is not available in Texas." *Id.* at 639 n.7. Although "a lawyer could in theory, and with his client's agreement, open a sub-account outside of Texas," *id.*, sub-accounting services are not free. The costs of sub-accounting may include monthly fees as well as "activity fees for almost all transactions." *Id.* at 640. In addition to these fees, there may be restrictions on the number of transactions permitted per month, and the account may be closed and the interest forfeited if the balance falls to zero for ten consecutive days. *Id.* Indeed, the district court found that the costs of sub-accounting "make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time." *Id.* at 641-42. In such situations, "the client funds would not be placed in IOLTA" in the first place. *Id.* at 642. Accordingly, the district court found, "Plaintiffs have failed to establish through the evidence before the Court that Mr. Summers' funds could theoretically earn interest in a sub-account." *Id* at 642.

Finally, the district court rejected plaintiffs' "net benefit" theory that "by decreasing the lawyer's costs through use of the client's money, the client will benefit." *Id.* The court found that "allowing attorneys to benefit from their clients trust accounts, even if they pass this benefit on to clients, would qualify as an ethical violation." *Id.* "More importantly," the court found, the plaintiffs' arguments "are made somewhat in a vacuum," because they "failed to present any evidence that Mr. Summers' money . . . did and could generate net benefit or net interest if not for IOLTA." *Id.* at 642-43. "[A]t a minimum Plaintiffs must present evidence to this Court that Mr. Summers is materially worse off because of IOLTA." *Id.* at 643.

In rejecting plaintiffs' contention that virtually all clients could benefit financially outside of an IOLTA account, the district court credited the testimony of lawyer Claude Ducloux. Mr. Ducloux, like 31% of Texas lawyers in private practice, is a solo practitioner. *Id.* at 639. Mr. Ducloux testified that on average he keeps the funds of 20 to 30 clients in his client trust account; that the balance in the account averages between $20,000 and $30,000; that most client funds remain in the account for 30 to 60 days; and that the account earns interest at a rate of 0.72%. *Id.* Mr. Ducloux testified that his client trust account generally earns less than $15 per month in interest, and that in the prior month his account had generated $10 of net interest and $12 in bank charges. *Id.* Mr. Ducloux explained why it is not economically feasible to allocate this relatively small amount of interest among 20 or 30 clients:

> Say somebody comes to me with an uncontested divorce. I usually require a $500 retainer and I talk to the parties. I have a full routine I go through. I would put that $500 into my trust account. I would explain to the client that that money is going into a trust, and

if it's not used up – but it likely will be – they will have a refund of anything that is not used.

I would then have to wait before I started calculating interest on when that check clears. The bank does not give me credit from the day it's deposited . . . Which means I have to get on the phone with the bank two or three days later before I could put in the correct figure and find out if that check given by the client has finally cleared. When it clears, then I make an entry into my billing program.

I would then have to know the interest rate. I would then execute a check from that for $165 for the filing fee [for divorce] in Travis county. Now I have to wait and see when that check clears so I can cut off the interest on that $165 that goes to the district clerk's office. This usually means that either I have to have some unknown technical connection to the bank where I can pull it up and find out immediately or I have to dial my bank's number, enter my code and wait in what I call voice jail for about five minutes until I find out that no, indeed, the check hasn't cleared. So I keep letting it ride and I call back tomorrow again.

Tr. 276-77.

The district court also heard from Karen Neeley, general counsel for the Independent Bankers' Association of Texas, who testified that banks in Texas are not offering sub-accounting because such products are too expensive for the banks. 86 F. Supp. 2d at 641. Ms. Neeley testified that it is time-consuming for banks to set up each sub-account; that bank charges are generally on the increase; that in many cases the use of sub-accounting would result in a net loss to

lawyers' trust accounts; and that the termination of the IOLTA program would not result in the introduction of sub-accounting services in Texas, but reversion to the pre-1984 status quo where lawyers' trust accounts earned no interest. *Id.*

Finally, the district court reviewed the testimony of Bruce Buell, a solo practitioner from Colorado with a specialization in banking and trust and estate law. Mr. Buell testified that IOLTA accounts cost less in bank service charges and require less attorney time than non-IOLTA accounts. He noted that in Texas, the TEAJF pays all bank service and maintenance fees on IOLTA accounts so there is no charge to the attorney; that generally banks do not require minimum balances on IOLTA accounts; that there are no restrictions on transfers or withdrawals, and that there is one monthly reconciliation. By contrast, Mr. Buell testified that bank sub-accounts have maintenance and service fees, minimum balances, restrictions on transfers and withdrawals, and require monthly reconciliations for the master account and each sub-account. *Id.* Finally, the district court credited Mr. Buell's testimony that the costs of maintaining an IOLTA account are not passed to the clients, while the costs or maintaining a sub-account would be passed on. *Id.*

The district court concluded that "Plaintiffs have failed to present evidence of a loss. The Court finds that, based upon all the evidence before it, Mr. Summers's loss is zero." *Id.* at 643.

The trial in the Texas case, and the district court's extensive findings of fact, may explain Petitioners' decreased reliance on the argument WLF made to this Court in *Phillips* that "virtually all" clients suffer an actual economic loss as a result of IOLTA programs. To be sure, specific findings of fact concerning the Texas IOLTA program do not necessarily apply to the Washington IOLTA program. The outcome of the trial on remand in *Phillips* nevertheless casts serious

doubt on Petitioners' representations that Washington clients would benefit financially if their funds could be deposited elsewhere than an IOLTA account.

Furthermore, the Washington and Texas IOLTA programs share a key feature: if funds can be made to earn net interest for the client, then the lawyer (or Washington LPO) holding the funds is *prohibited* from placing the funds in an IOLTA account. 86 F. Supp.2d at 639; *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 858 (9th Cir. 2001) (en banc), *cert. granted*, 122 S. Ct. 2355 (2002). Thus, both programs are designed to assure that clients receive any net interest that is capable of being earned on their principal. If a particular client in Washington or Texas *does* suffer an economic loss, it is a result of lawyer error or an unforeseen change in circumstances, not the structure of the IOLTA program. In either case, clients are entitled to recover the "lost" interest.[4]

B. There is No Non-Economic Loss

Petitioners also assert that the IOLTA program deprives them of the right "to control the uses to which their property is put," and that this right has value even if that value is difficult to measure. Pet. Br. 37. As the record in the Texas case demonstrates, the *economic* value of this right is not at all difficult to measure – it is zero. At the Texas trial, Petitioners did not even attempt to establish that they were entitled to any specific amount of compensation for loss of such a right. *See* 86 F. Supp. 2d at 643 ("Plaintiffs failed to establish an actual number denominating Mr. Summers' loss."). This is hardly surprising, because the trial record in

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[4] Like Washington, Texas provides for refunds upon request of interest earned on IOLTA accounts in situations in which the client's principal could in fact have generated net interest. The trial record in *Phillips* shows that as of September 1999, TEAJF had received 22 requests for refunds, totaling $27,000. Tr. 224. All 22 requests were granted. *Id.*

Phillips established that IOLTA programs do not, in fact, deprive any client of the right to control the uses to which their property is put. Instead, the record established that the property owner makes an independent decision – separate and apart from IOLTA or any authority of the State – to hand over money to a lawyer in circumstances in which the money cannot earn interest for the client. Once a client makes that decision, the rules of professional conduct – again separate from IOLTA – require the lawyer to deposit the client's money in a demand account. And once the money is deposited with a bank, the federal and state banking laws – also separate from the IOLTA rules – allow the bank to use the money in any way it sees fit, subject only to a requirement that it repay the principal amount on demand.

Client trust funds, including both IOLTA accounts such as the account at issue in *Phillips* and non-IOLTA accounts, are "general" rather than "special" accounts for purposes of Texas banking law. This means that the depositor's right is contractual in nature, and is limited to repayment of the balance of the account on demand. These basic facts were established at the trial in *Phillips*. Indeed, they were acknowledged by the private attorney plaintiff in the Texas case:

> Q. [Y]ou would have no right to complain how the bank uses the bank's money once you made the deposits.
>
> A. I have no right to complain about how the bank uses the bank's money.
>
> Q. So if [the bank] wanted to take that principal and give it away to a controversial political cause that you disagreed with or your client disagree[s] with, you would have no right to complain about that.
>
> A. That's right.

Tr. at 90.

As is apparent from the above exchange, Petitioners' claim that they have lost an "intangible" right as a result of IOLTA is untenable. Property owners give up the "right to control the uses to which their property is put" before the IOLTA rules comes into play. Thus, they cannot fairly complain that the IOLTA program divests them of this right, or that they are entitled to monetary compensation for its loss. *See* 271 F.3d at 863.[5]

II. WHERE THE PROPERTY OWNER SUFFERS NO ECONOMIC LOSS, THE AMOUNT OF JUST COMPENSATION DUE IS ZERO

In the Texas case, the district court concluded that "[w]ithout an identifiable compensable loss, the Court finds there has been no taking without compensation in violation of the Fifth Amendment." 86 F. Supp. 2d at 673. On appeal, six judges of the Fifth Circuit agreed that "[j]ust compensation for zero is zero." 293 F.3d at 253; *see also* 270 F.3d at 195. The Ninth Circuit also agreed with this conclusion, which supplies one of the grounds for the Ninth Circuit's holding that the Washington IOLTA program does not violate the Just Compensation Clause. 271 F.3d at 862.

Petitioners have remarkably little to say about the Just Compensation issue; they devote only three paragraphs of a 48-page brief to it. *See* Pet. Br. 35-37. Petitioners' cursory argument does not dispute the "constitutional truism" that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Petitioners also do not deny

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[5] Even if Petitioners could show that they have lost a "right to control" the use to which their property is put, they cannot show that this right was "taken" in the constitutional sense, as explained in Part III below.

that the purpose of "just compensation" is to put "the owner of condemned property 'in as good a position *pecuniarily* as if [the] property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979), *quoting Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis added). The relevant question, for just compensation purposes, is "What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.). Accordingly, where "nothing of value was taken," "[n]othing [is] recoverable as just compensation," even if "technically" there has been a "taking." *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926).

Rather than confronting these principles, Petitioners seek to divert attention from them by asserting that the Ninth Circuit's decision rests on a "rationale rejected in *Webb's* [*Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980)], that a statutory seizure is permissible simply because it 'takes only what it creates.'" Pet. Br. 36. Petitioners misstate the Ninth Circuit's rationale. It is true that the government is not required to compensate property owners for value that is created by the government, and this rationale *does* support the Ninth Circuit's ruling. *See United States v. Fuller*, 409 U.S. 488, 492 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In this case, however, the Ninth Circuit rested its decision on the distinct principle that the purpose of the Just Compensation Clause is to put the property owner "in as good a position pecuniarily as if the property had not been taken." 271 F.3d at 861-62.

Webb's involved a substantial amount of principal, which indisputably was capable of earning and did earn a substantial amount of net interest. The property owner would have received the net interest but for the State's intervention. Thus, the property owner in *Webb's* clearly suffered a real economic loss as a result of the challenged rule. In this case, by contrast, the property owner *could not* earn net interest,

with or without IOLTA, and therefore the economic loss to the property owner is zero.

In a footnote, Petitioners – without citing any authority – deny that just compensation is determined by comparing their "purely economic situations" in the "pre-IOLTA" and "post-IOLTA worlds." Pet. Br. 36 n.14. Petitioners assert – without elaboration and again without citation of any supporting authority – that "[t]he compensation due here is exactly equal to the amount taken." Pet. Br. 36. Petitioners' assertions directly conflict with the principle that the purpose of just compensation is to put the property owner in as good a position pecuniarily as if the property had not been taken. That established approach to just compensation *requires* comparison of the claimants' economic situations (1) following the government's challenged action and (2) in the absence of the challenged action. Try as they may, Petitioners cannot escape the fact that their economic position is exactly the same in both cases.

Petitioners contend that the Ninth Circuit erred in its determination that injunctive relief was improper, asserting that they are entitled to an injunction shutting down the State's program in its entirety, despite their inability to prove damages. Pet. Br. at 38-43. But a successful claimant under the Fifth Amendment is entitled to compensation, not an injunction. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 & n.5 (1982). Compensation for the loss is more than just the preferred remedy. As this Court has repeatedly observed, in the absence of a denial of just compensation there is no constitutional cause of action. *Williamson County*, 473 U.S. at 194-95; *City of Monterey*, 526 U.S. at 710. This means that a plaintiff asserting a violation of the Just Compensation Clause must not only allege a compensable loss, but must seek compensation in the appropriate forum before submitting its constitutional claim to a federal court. *See*

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

The notion that a federal court injunction is available to a plaintiff who cannot prove a loss and has refused to seek compensation through available state processes – a notion that was adopted by the Fifth Circuit in the Texas case – overturns a century of Fifth Amendment jurisprudence. Justice Holmes' famous maxim in the *City of Boston* case would become "What has the owner lost? If nothing of economic value, proceed directly to federal court and obtain an injunction."[6]

Petitioners' reinterpretation of the Just Compensation Clause to mean that a gain to the government is unconstitutional even if there is no loss to a property owner has no grounding in the words or purpose of the Fifth Amendment. That Clause refers to the taking of "private property . . . for public use without just compensation." U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing government action, but with providing compensation for action that takes "private property" and fails to compensate the property owner. "[The Takings Clause] is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church*, 482 U.S. at 315; *see also Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in

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[6] The Fifth Circuit held that the Texas officials had conceded at an earlier stage of the litigation that they were "subject to [plaintiffs'] prospective injunction claims." 270 F.3d at 190. Judge Weiner in dissent contended that they "have done no such thing" and that there is "a vast difference between conceding that the Eleventh Amendment is not a *bar* to the assertion of a *claim*, on the one hand, and conceding *entitlement* to the *relief sought* by asserting a claim on the other." *Id.* at 196.

judgment and dissenting in part) (Takings Clause "has not been understood to be a substantive or absolute limit on the government's power to act. That clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.").

Petitioners' attempt to write the "just compensation" language out of the Fifth Amendment is unsupported and unsupportable, for compensation is the essence of the constitutional protection. Even if a taking is considered "per se," it is still subject to a determination of what compensation, if any, is due. *See, e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1013 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (remanding for compensation determination). Because Petitioners do not, and cannot, establish any compensable loss of the sort that the Fifth Amendment was designed to protect, there can be no constitutional violation, and thus no right to a remedy of any kind, much less an injunction shutting down the entire IOLTA program.

III. IOLTA PROGRAMS DO NOT "TAKE" PRIVATE PROPERTY IN THE CONSTITUTIONAL SENSE

Petitioners devote most of their argument to an effort to persuade the Court to apply a per se analysis to the Washington IOLTA program. (Pet. Br. 17-30.) In arguing that the Court should apply per se takings analysis in this case, Petitioners are attempting to swim against a very strong current. This Court recently reaffirmed that "[t]he temptation to adopt what amount to per se rules in either direction must be resisted." *Tahoe-Sierra*, 122 S. Ct. at 1478, 1481 n.23, 1489 (citation omitted). In addition, the Court repeatedly has declined to apply per se takings analysis to required payments of money to the government. *See Eastern Enters.*, 524 U.S. at 529-30 (plurality opinion); *United States v.*

Sperry Corp., 493 U.S. 52, 62 n.9 (1989); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., Inc.*, 508 U.S. 603, 643-44 (1993); *Bowen v. Gilliard*, 483 U.S.-587, 606 (1987); *Connolly v.* PBGC, 475 U.S. 211, 224 (1986).

Setting aside some flights of rhetoric, *see, e.g.,* Pet. Br. 21 (asserting that Washington's IOLTA program "perpetrates an . . . undisputed taking," even though the issue plainly is disputed), Petitioners advance two main arguments in an attempt to overcome the strong presumption against applying per se takings analysis.[7] *First*, they assert that the Washington IOLTA program is nothing more than "a simple appropriation of property from a small number of individuals." Pet. Br. 21. *Second*, they assert that "no rationale has been offered or can be offered for singling out those individuals to bear that burden." *Id.* Once again the factual record developed in the Texas case refutes Petitioners' arguments.

Petitioners' argument proceeds by disregarding the client's principal and considering the interest earned on that principal as the sole relevant property. In the "real world," Pet. Br. 33, of course, clients are likely to regard their principal as highly relevant. Indeed, since clients cannot realize any interest on their principal, with or without IOLTA, they are likely to be far more concerned about principal than interest – if they are concerned about interest at all.[8] If Petitioners' approach were adopted, property interests could always be defined in such a way that the

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[7] Notably, Petitioners abandon an argument that they made in the courts below: that this Court's decision in *Webb's* compels application of per se taking analysis.

[8] In *Phillips,* Petitioner WLF was able to find only a single client in all of Texas willing to join its lawsuit. In this case, none of the individual petitioners is a client of a lawyer.

government action in question takes 100% of the "relevant" property. This Court repeatedly has declined to chop up property interests in this way. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Concrete Pipe & Prods.*, 508 U.S. at 643-44; *Tahoe-Sierra*, 122 S. Ct. at 1483-84.

Petitioners' argument also depends on rigidly divorcing the IOLTA program from the rules of professional conduct that serve to protect client funds entrusted to a lawyer, as well as the system of banking laws and regulations that govern funds deposited in financial institutions. Thus, Petitioners sweepingly assert that the "burden" imposed by an IOLTA program "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged." Pet Br. 27. *See also* id. at 22 ("burden" of IOLTA is imposed "capriciously" and "haphazardly"). Petitioners are incorrect, for several reasons.

IOLTA programs, including both the Washington and Texas programs, are designed precisely to avoid imposing *any* economic burden on clients. The trial in the Texas case established that the economic loss incurred by the plaintiffs in that case as a result of the IOLTA program is zero. As the district court explained in the Texas case, the plaintiffs "could not maintain they are being unfairly singled out to bear a burden, when they are in fact, bearing no burden at all. The IOLTA program costs Plaintiffs nothing. The governmental action in this case does not implicate fundamental principles of 'justness and fairness,' because there is no cost to Plaintiffs." 86 F. Supp. 2d at 646-47.

Nor can Petitioners reasonably complain that they are subjected to a *non*-economic burden, in the form of a "right to control the uses to which their property is put." Pet. Br. 37. As explained above, the IOLTA rules apply only *after* a client has given up the right to control the uses to which the

property is put, by handing over funds to a lawyer (or Washington LPO) to be deposited in a bank account. As shown by the trial record in the Texas case, the bank can make whatever use of the deposited funds it pleases, subject only to a contractual obligation to return the principal upon demand.

In assessing Petitioners' claim that they have lost "valuable, non-economic rights in their property" it is instructive to consider this Court's opinion in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Pruneyard*, the Court addressed an argument that a state constitutional provision took private property by allowing individuals to exercise rights of free expression at privately-owned shopping centers. In an opinion written by then-Justice Rehnquist, the Court acknowledged that "there ha[d] literally been a 'taking'" of the "right to exclude others," *id.* at 82 (internal quotations and citations omitted), and observed that this right is "one of the essential sticks in the bundle of property rights." *Id.* The Court held nevertheless that there was no taking in a constitutional sense, because the owners of the shopping center had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84. In so holding, the Court emphasized that the property owners had opened the shopping center "to the public at large," and that they were able to "minimize any interference with its commercial functions." *Id.* at 83.

The Court's rationale in *Pruneyard* is applicable to IOLTA programs. With or without IOLTA, the funds at issue are voluntarily handed over to the client's lawyer and placed in a non-interest-bearing account. Thus, the client whose funds are placed in an IOLTA account has made a choice under which he or she never could exercise any "right to exclude" even before IOLTA. Nor, in the context of funds that would have been deposited in a non-interest-bearing account for the bank to enjoy their use value, has the client lost anything of

economic value. He or she would not receive any interest if the program did not exist. Here, as in *Pruneyard*, there has been no taking in the constitutional sense.

Not only are Petitioners wrong in asserting that IOLTA programs impose a substantial "burden" on property owners, they are also wrong that this alleged "burden" falls "capriciously" or "haphazardly" on some property owners but not others. Property owners subject to the IOLTA program are precisely those who have voluntarily entrusted their money, without any government compulsion, to a lawyer or LPO in circumstances in which the money cannot earn interest for the client. Thus, the program is organized in an entirely rational way to avoid imposing economic loss on *any* citizen.

Petitioners assert that IOLTA programs have no connection to a client's decision to entrust a lawyer or LPO with the client's money. *See* Pet. Br. 16 ("The IOLTA program involves no regulatory purpose of any sort. It simply sets out to raise large sums of money for governmental objectives . . . . The individuals thus singled out have no particular connection to the provision of legal services."); *id.* at 28 ("burden" of IOLTA "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged"). Once again, Petitioners' assertion is incorrect. As Petitioners themselves acknowledge, each client whose funds are subject to the IOLTA rules has made a "decision to utilize the legal system." *Id.* There can be no serious dispute that a fee for use of the legal system is reasonably related to providing low-income persons with access to the legal system. States such as Washington and Texas have chosen to apply the IOLTA rules to a subset of those who decide to utilize the justice system, namely those who can participate at zero economic cost. That limitation (which burdens no one and benefits users of the justice system) does not alter the relationship between a client's decision to utilize the legal

system and a program that provides increased access to that system for low-income persons.

The trial record in the Texas case demonstrates that in Texas, the IOLTA program actually provides a direct benefit to many clients. The rules of professional conduct requiring lawyers to place client funds in a bank, segregated from the lawyer's own funds and available on demand, are intended to benefit clients. Banks do not provide their services for free, and in many cases – as it turns out, nearly 50% of the time in Texas – the bank's fees actually *exceed* the interest earned on client trust accounts. In these cases, the Texas IOLTA program *pays the excess fees*. *See* 86 F. Supp. 2d at 643 (citing trial testimony "stating that 46-47% of IOLTA accounts cause TEAJF to lose money and that TEAJF pays negative fees"). The trial record in the Texas case thus demonstrates that the Texas IOLTA program directly benefits clients, by ensuring that they receive the protection of the rules of professional conduct (funds deposited in a bank account, segregated from the lawyers' funds, and available on demand) at no cost. The facts thus belie Petitioners' sweeping assertions that the "burden" imposed by IOLTA programs "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged." Pet. Br. 28.

* * * *

All 50 States and the District of Columbia have established some form of IOLTA program. The trial in the Texas case demonstrated that, in fact as well as in theory, IOLTA programs impose no economic or non-economic loss on property owners. IOLTA programs are designed to avoid imposing a burden on property owners, and may in fact benefit clients by absorbing the cost of excess bank fees. Petitioners have not sought compensation from the State of Washington, but instead have gone directly to federal court

seeking to enjoin the State's program. A decision striking down the Washington IOLTA program in these circumstances would depart significantly from principles of federalism and stretch the Just Compensation Clause beyond its proper limits, with consequences that may be difficult to foresee.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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